IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 28, 2009

STATE OF TENNESSEE v. JOHN HENRY HARPER, JR.

Appeal from the Criminal Court for Sullivan County
No. S50,648 R. Jerry Beck, Judge

No. E2008-02133-CCA-R3-CD - Filed August 17, 2009

The defendant, John Henry Harper, Jr., pleaded guilty in the Sullivan County Criminal Court to four counts of sexual battery by an authority figure, *see* T.C.A. § 39-13-527 (2003), four counts of incest, *see id.* § 39-15-302, and four counts of statutory rape, *see id.* § 39-13-506. The trial court imposed a plea-bargained effective sentence of seven years and denied the defendant's requests for probation or other alternative sentencing. It is from this order that the defendant appeals. Upon de novo review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Joseph F. Harrison, Blountville, Tennessee, for the appellant, John Henry Harper, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and James F. Goodwin, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 31, 2007, the defendant entered pleas of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970),[1] to four counts of sexual battery by an authority figure, four counts of incest, and four counts of statutory rape in exchange for an effective sentence of seven years. The defendant's plea agreement provided that the last four years of the seven-year sentence be served on supervised probation and that the manner of service of the first three years was to be determined by the trial court.

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[1] In that case, the United States Supreme Court held that a criminal defendant may enter a guilty plea without admitting guilt if the defendant intelligently concludes that his best interests would be served by a plea of guilty.

The convictions in this case relate to the sexual abuse perpetrated by the defendant against his 15-year-old daughter, A.H., during the summer of 2004.[2] The State offered as its factual summary of the case the written investigative summary and the defendant's written statement of guilt. The investigative summary provides:

> On 9/15/04, I received a referral from the Department of Children's Services, in which [A.H.], age 15, revealed that she had sexual intercourse with her biological father, [the defendant], last summer on several occasions. This referral was made by Dr. Judy Millington, therapist, who was counseling [A.H.] for depression and self-mutilation. According to Dr. Millington, the sexual relationship between [A.H.] and [the defendant] was initiated by [the defendant] and was her payment to him in exchange for allowing her to see her boyfriend.
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> On 9/30/04, [A.H.] was interviewed by Department of Children's Services caseworker, Veronica Camp, and she divulged to Ms. Camp that the sexual abuse began around the end of last summer, while she was temporarily living with her father and step-siblings . . . . [A.H.] told Ms. Camp that she was approached by her father to have a sexual relationship with him if she wanted to see her boyfriend . . . .
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> [A.H.] said that her father initiated sex with her by telling her that he would help her if she would help him. He justified their relationship by telling [A.H.] that sex is a way of relieving stress and a way of showing love for each other. He promised that it would make them closer, that they would get along better and she could be with [her boyfriend]. [The defendant] told [A.H.] that since their sexual relationship was consensual, it was not rape.
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> [A.H.] said that she could not recall the exact dates of their sexual encounters but said that she and her father had intercourse at least eight or nine times. [A.H.] told Ms. Camp that she was a virgin when she began having sex with her father . . . . [H]er father removed all of her clothes but only pulled down his pants. He often put his fingers inside her vagina and rubbed her breasts. . . .
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> [The defendant] provided a written statement in which he confessed to having sexual intercourse with [A.H.]. He said that [A.H.] came

[2] As is the policy of this court, we will refer to the minor victim only by her initials.

> to spend the summer with him around the fourth or fifth of June and was there until the start of the new school year, around the 18th of August. Before he and [A.H.] started having intercourse, she approached him regularly with questions regarding sex. He said that she asked him to teach her about sex but he refused. [The defendant] said that [A.H.] was supposedly a virgin but her stepsisters and friends told him that she had been sexually active since age 14. During his interview, he referred to her as a "slut" and said that when they first had intercourse, he did not see any blood to indicate that she was a virgin. [The defendant] said that the sexual relationship was instigated by [A.H.] in an effort to get him to agree to let her see [her boyfriend]. . . . [The defendant] could not recall the number of times that he and [A.H.] had intercourse throughout the summer, but he said that eight or nine times is a reasonable estimate. He also said that most of the episodes occurred in his bedroom and that [A.H.] always made the first move.

At the September 17, 2008 sentencing hearing, the trial court imposed the agreed-upon effective sentence of three years for counts 1-6 and four years for counts 7-12 and ordered that those sentences be served consecutively for a total effective sentence of seven years. The court further agreed to order that the effective four-year sentence imposed on counts 7-12 be served on supervised probation.

The 42-year-old defendant testified that he had steady employment in the heating and air conditioning business and that he had switched from a company that performed residential services to one that performed only commercial services so as to have no contact with minor children. He had also purchased a residence to fulfill the requirement that he no longer reside in the same home with minor children. He stated that he was "[a]shamed" of his sexual relationship with the victim and lamented that he "wished [he] could do it over." The defendant asked the court to order a sentence of full probation and said, "I'm sorry. I mean, I made a mistake. I just want to get my life straightened out." He said there was no chance that he would commit a similar crime in the future.

At the conclusion of the hearing, the trial court commended the defendant's work history and his lack of a significant criminal history. The court found that the defendant was "treatable" as indicated by the sexual offender evaluation and noted his moderate to low risk to re-offend. After observing that the victim's mother had submitted a victim impact statement, the court stated that it would not consider her opinion that the defendant had "destroyed" the victim's life but would consider "those personal observations she made of the victim." The court also concluded that the defendant "[h]as the unfavorable enhancing factor of for sexual gratification in some of the cases. Then a violation of private trust." After observing that the defendant was ineligible for a community corrections sentence, the trial court denied "probation in all forms and kinds."

In this appeal, the defendant challenges the trial court's denial of probation or other alternative sentencing. The State submits that the trial court properly denied probation and all forms of alternative sentencing.

When a defendant challenges the length and manner of service of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the defendant. *Id*. If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the guilty plea and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(b); -103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

The General Assembly has recognized that because of the limited capacities of state prisons, "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration." T.C.A. § 40-35-102(5) (2003). Accordingly, a defendant who does not fall within these parameters and "who is an especially mitigated or standard offender convicted of a Class C, D or E felony, is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." *Id.* § 40-35-102(6).[3] An alternative sentence is any sentence that does not involve total confinement. *See generally State v. Fields*, 40 S.W.3d 435 (Tenn. 2001). Because, in this instance, the sentence imposed is eight years or less, the trial court was required to consider probation as a sentencing option. *See* T.C.A. § 40-35-303(a), (b). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

[3] In 2005, our legislature removed the presumption of favorable candidacy for alternative sentencing. *See* T.C.A. § 40-35-102(6) (2006).

When examining a defendant's suitability for an alternative sentence, the trial court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A)-(C). In addition, a defendant's potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. *Id.* § 40-35-103(5).

The defendant is required to establish his "suitability for full probation." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b); *State v. Bingham*, 910 S.W.2d 448, 455-56 (Tenn. Crim. App. 1995), *overruled in part on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 297 S.W.2d 78, 81 (1956)), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10. Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

Because the record establishes that the trial court failed to consider all relevant sentencing principles and specifically failed to consider the factors contained in Code section 40-35-103, our review is purely de novo.

As a standard offender convicted of Class C and E felonies, the defendant is presumed to be a favorable candidate for alternative sentencing; however, he bears the burden of establishing his suitability for full probation. Because the defendant was convicted of sexual battery by an authority figure, he is not eligible for a community corrections sentence. *See* T.C.A. § 40-36-106.

The record establishes that the 41-year-old defendant coerced his 15-year-old daughter into a sexual relationship by promising to allow her to see a boy that her mother had previously forbidden her from seeing. He admitted having sex with the victim eight or nine times during the two and a half months that she lived with him. The victim stated that each instance of sexual contact included both digital and penile penetration as well as fondling of the victim's breasts. Despite the defendant's pleading guilty to twelve offenses, the record establishes that the defendant

was likely guilty of at least twice that many offenses. Moreover, the plea agreement already provides the defendant with a great deal of leniency in the form of probation for the last four years of his effective seven-year sentence. "A sentencing court may consider a defendant's enjoyment of leniency in the selection of a particular conviction offense in awarding or rejecting alternative sentencing options." *State v. Dwayne Anthony Dixon*, No. E2007-02237-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Knoxville, Aug. 26, 2008); *see also State v. Samuel D. Braden*, No. 01C01-9610-CC-00457, slip op. at 15 (Tenn. Crim. App., Nashville, Feb. 18, 1998); *State v. Steven A. Bush*, No. 01C01-9605-CC-00220, slip op. at 9 (Tenn. Crim. App., Nashville, June 26, 1997); *State v. Fredrick Dona Black*, No. 03C01-9404-CR-00139, slip op. at 3-4 (Tenn. Crim. App., Knoxville, Apr. 6, 1995).

Furthermore, when confronted with the relationship, the defendant refused to take responsibility for his actions and, instead, blamed the minor victim for the relationship, even referring to her as a "slut" during his interview with the Department of Human Services caseworker. The psycho-sexual evaluation established that the defendant continued to place blame on the victim. During the evaluation, which took place in March of 2008, the defendant attempted to minimize the offenses by telling the evaluator that he had sex with the victim only two times. He referred to the victim as "mean" and claimed he only had sex with her after she had begged him to do so. "'[A] defendant's credibility and willingness to accept responsibility for the offense are circumstances relevant to determining his rehabilitation potential.'" *Dwayne Anthony Dixon*, slip op. at 6 (quoting *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994) (citing *State v. Anderson*, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992))).

Under these circumstances, it is our view that confinement is necessary to avoid depreciating the very serious nature of the offenses in this case. Given the extent of the sexual activity during such a short time span, the leniency already afforded the defendant by the plea agreement, and the defendant's failure to accept responsibility for his actions, any further grant of alternative sentencing is unwarranted.

Accordingly, upon our de novo review, we affirm the trial court's denial of alternative sentencing. In consequence, the judgments of the trial court are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE